In The

Supreme Court of the United States

OCTOBER TERM 1976

No. 76-282

DR. DON M. SMART,

Petitioner,

v.

CLARENCE JONES, et al.,

Respondents.

BRIEF FOR RESPONDENTS ORVIS, JONES, GRANDSTAFF, BARRETT AND BARRETT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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Respondents Judge John J. Orvis, Sheriff Clarence Jones, and Deputy Sheriffs J. W. Grandstaff, Benny Barrett and Gail R. Barrett, respectfully submit this brief in opposition to the petition for a writ of certiorari of Dr. Don M. Smart.

QUESTIONS PRESENTED

1. Is a capias issued by a clerk of the court as authorized by Texas law a per se violation of the due process requirements of the United States Constitution?

2. Was the Petitioner denied constitutional due process by the Summary Judgment granted against him?

3. Is judicial immunity a denial of the due process and equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Respondents cannot agree with the Petitioner's Statement of the Case and feel the necessity of restating it.

This litigation arose out of incidents that transpired on September 11, 1972, when Respondent J. W. Grandstaff, a Deputy Sheriff, attempted to serve a notice of a commissioners' hearing on Petitioner Dr. Don M. Smart in condemnation proceedings initiated by Texas Power & Light Company. Dr. Smart attempted to prevent service of this notice by refusing to come to the door and subsequently attempting evasive action in the car he was driving. When Deputy Grandstaff followed him, Dr. Smart suddenly applied the brakes several times in an attempt to cause Deputy Grandstaff to crash into the rear of his car. Dr. Smart's efforts were assisted by his nurse, subsequently his wife, Nancy G. Smart, who followed Deputy Grandstaff. Together they attempted to position their cars so as to force Deputy Grandstaff off the road. Eventually these tactics succeeded and Dr. Smart eluded Deputy Grandstaff who requested the assistance of other law enforcement officials by radio. A police officer stopped and arrested Mrs. Smart. Deputies Benny Barrett (B. Barrett) and Gail Barrett (G. Barrett) arrived on the scene and took Mrs. Smart to the courthouse where she was taken before a magistrate and placed in jail.

Deputy Grandstaff made a report of the incident, which was

transmitted to the District Attorney's office. Assistant District Attorney Lem Brotherton took an affidavit from Grandstaff and filed an information charging Dr. Smart with aggravated assault. The case was filed in County Criminal Court No. 2 of Dallas County, Texas, Judge John J. Orvis presiding, and the clerk of the court issued a capias for Dr. Smart's arrest.

Deputies Grandstaff and B. Barrett proceeded back to Dr. Smart's office and arrested him under the authority of the capias. Deputy G. Barrett rode with the other deputies in order to return to her car, which she had parked when she assisted bringing Mrs. Smart to the courthouse. She did not participate in Dr. Smart's arrest. Dr. Smart was taken to the county jail where he was released on bail within four hours.

Dr. Smart's criminal case pended for several months in the Court of Judge John J. Orvis before Assistant District Attorney John Tolle filed a motion to dismiss, which was granted.

Dr. Smart brought the instant suit against the Respondents alleging that his civil rights had been violated and that he had been damaged in several respects, including the arrest of his later wife. While this suit was pending, his wife's civil rights case brought against the Sheriff and his deputies was decided adversely to her, which result was affirmed on appeal. *Smart v. Jones,* 493 F.2d 663 (5th Cir. cert. denied .... U.S. ...., 95 S.Ct. 681, rehearing denied .... U.S. ...., 95 S.Ct. 1151 (1975).

The instant suit was filed in the Northern District of Texas on September 13, 1973, and was assigned to Judge Eldon B. Mahon. In February, 1974, Judge Mahon dismissed Judge Orvis from the suit based upon *Pierson v. Ray,* 386 U.S. 547,

87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). On August 2, 1974, this cause, along with other cases on Judge Mahon's Dallas docket, was transferred to newly appointed Judge Robert W. Porter. Judge Porter, just prior to his appointment to the federal bench, served as co-counsel with the undersigned for various Dallas County officials in class-action civil rights suits. Judge Porter, therefore, had civil rights cases against Dallas County officials transferred to other judges of the Dallas Division. The instant cause was transferred to Judge W. M. Taylor's docket.

After extensive discovery, all parties to the suit moved for summary judgment and the district court, after a hearing in chambers and providing an extended time for parties to bring additional matters to its attention, granted a summary judgment against Dr. Smart. The Court of Appeals for the Fifth Circuit affirmed. *Smart v. Jones,* 530 F.2d 64 (5th Cir. 1976).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The Decision of the Court of Appeals Was In Accord With Applicable Decisions of This Court.

The Petitioner poses four separate issues in his petition for certiorari, but he actually attempts to justify a review by writ of certiorari under the considerations specified in Rule 19, Sup. Ct. Rules, only with respect to his issue of whether a Texas capias meets the constitutional due process requirements for an arrest warrant. Petitioner argues that a capias issued by a clerk in Texas fails to meet the due process requirements of the Constitution. While Petitioner cites three decisions of this Court, none of which are specifically in point, he fails to cite the controlling decision, *Shadwick v. City of Tampa,* 407 U.S. 345,

92 S.Ct. 2119, 32 L.Ed.2d 783 (1972). In *Shadwick* this Court held the issuance of arrest warrants by clerks of a court pursuant to local or state authority did not violate the Constitution if the clerk was independent of the prosecutor or the police. The Petitioner himself points out that the capias in the instant case was issued by a deputy clerk acting for the county clerk, who is an elected county official. Thus this issue concerning the constitutionality in the abstract of the authorization by Texas law for clerks to issue a capias has already been completely covered by *Shadwick v. City of Tampa,* supra.

The Petitioner also urges this Court to hold that judicial immunity to damage suits is a denial of due process and equal protection of the law under the Fifth and Fourteenth Amendments. The Petitioner pitches his argument on the basis that judicial immunity is an outdated self-serving legal principle which should be abolished in order to engender respect for the judiciary. He fails, however, to state just how judicial immunity violates either the due process or equal protection clauses of the Constitution. This Court has fully considered the applicability of the judicial immunity doctrine to civil rights acts suits in *Pierson v. Ray,* 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967). The Petitioner raises no new substantial issues requiring a reconsideration. Indeed, the allegations of this very suit illustrate the continuing need of judicial immunity to prevent the harassment of the judiciary by dissatisfied parties.

2. The Decision of The Court of Appeals Does Not Call for An Exercise of the Supreme Court's Powers of Supervision.

The Petitioner initiated the instant suit alleging a conspiracy

among officers of Texas Power & Light Co. and Dallas County officials to wrongfully condemn a portion of his property and to falsely arrest, imprison and criminally prosecute him. Apparently he is now suggesting that the alleged conspiracy expanded to the federal district judge who granted summary judgment against him. The Petitioner's accusation that he was denied due process because the district judge did not recuse himself from the case is totally frivolous. The district judge who granted the summary judgment had been a member of the district attorney's staff forty years ago and also had been in a law firm associated with Respondent Burns, which firm represented Texas Power & Light Co. thirty years ago, but he had not been associated with any of the defendants for the past thirty years prior to the litigation. Such old associations unrelated to the instant suit do not meet the grounds for disqualifying a judge under 28 U.S.C. § 455.

The Petitioner further complained that the district court should not have granted summary judgment against him without having a full evidentiary hearing. Rule 56, Fed. R. Civ. P., does not call for a formal evidentiary hearing prior to the entry of a summary judgment. The informal conference in chambers with the district judge fully complies with the requirements of the Rule and did not hinder the Petitioner's opportunity to argue why summary judgment should be granted in his favor instead of the Respondents' favor. *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970).

The Petitioner's argument that the district court should not have been able to take notice of Mrs. Smart's unsuccessful civil

rights action against four of the defendants in this suit arising out of the same set of circumstances is also meritless. Petitioner was counsel of record for his wife, had a financial stake in her claim of a loss of future earnings, which would have been community property in Texas, and sought damages for her arrest. The judge was entitled to consider that case as a means of eliminating possible fact issues.

The Court of Appeals' decision does not call for this Court's exercise of its supervisory power.

The decision below turns on its own rather unique facts and will affect few, if any, other litigants. No major pronouncements of law were made which should be considered by this Court. Instead this case concerned a mere application of settled law to its own facts.

Neither does the Petitioner establish that the opinion below conflicts with applicable state law on an important issue of state law. The case cited by Petitioner, *Burch v. City of San Antonio*, 518 S.W.2d 540 (Tex. 1975), concerns delegation of the condemnation power by a city, not the internal procedures of a corporation. Furthermore, the question of whether Texas Power & Light Co. followed the correct internal steps for filing a petition in condemnation is irrelevant to Petitioner's claims in the instant case of how his constitutional rights were allegedly violated.

The Petitioner has utterly failed to establish any special and important reason for granting a review on writ of certiorari in the instant cause.

CONCLUSION

For the reasons stated above, the Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned Notary Public in and for Dallas County, Texas, on this day personally appeared EARL LUNA, who being by me duly sworn, upon oath stated: I, EARL LUNA, am a member of the Bar of the Supreme Court

of the United States and am one of the attorneys of record for Respondents Orvis, Jones, Grandstaff, Barrett and Barrett herein.

I further state upon oath that upon the 11 day of September, 1976, I served 3 copies of the foregoing Brief of Respondents Orvis, Jones, Grandstaff, Barrett and Barrett, in Opposition to Granting Writ of Certiorari on S. L. Lewis and Dr. Don M. Smart, Room 101, 10611 Garland Road, Dallas, Texas 75218, Counsel for Petitioner; Mr. Alan Wilson, 1200 One Main Place, Dallas, Texas 75250, Counsel for Respondent Fidelity and Deposit Company; John B. Tolle, Dallas County Courthouse, Dallas, Texas 75202, Counsel for Respondents Wade, Tolle and Brotherton; and Robert E. Burns, 1511 Fidelity Union Life Building, Dallas, Texas 75201, Counsel for Respondents Skelton, Burns and Texas Power & Light Co., by depositing the same in the United States Mail, with first class postage prepaid.

Earl Luna

SUBSCRIBED AND SWORN TO before me by the said EARL LUNA, this the 11 day of September, 1976.

Notary Public, Dallas County, Texas